In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1940

No. 145

NICK BALABANOFF,
Petitioner,

vs.

R. H. KELLOGG, C. P. MORGAN, PEARL E. KELLOGG, JOSEPHINE L. KELLOGG, LAURENCE SOWLES and MARTHA ALDRICH, doing business under the firm name and title of Cache Creek Mining Company,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review a decision of the United States Circuit Court

of Appeals for the Ninth Circuit, which decision was entered in the above-entitled matter after rehearing on January 15, 1941, affirming a decree rendered by the District Court of the Territory of Alaska, Third Division, one of the judges dissenting.

OPINION OF CIRCUIT COURT OF APPEALS.

The opinion of the Court below filed December 10, 1940, with the dissenting opinion and its opinion on rehearing filed January 15, 1941, are reported in 118 Federal Reporter (2d) p. 597.

OPINION OF TRIAL COURT.

The opinion of the trial Court appears at page 103 of the Transcript of Record.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Sections 138, 135 and 347 (2) of the Judicial Code (28 U. S. C. A. 225 and 235) and under the rules of the Supreme Court numbers 38, 39, 41, 42 and 43, as the same appear in 306 United States Reports.

This decision is at variance with fundamental pronouncements laid down in decisions of other Federal

Courts and of this Court upon the use of water in placer mining and as to the appropriation and ownership of the right to its use on the public domain.

The disposition made of this suit by the lower Courts, if allowed to stand, will change all long-used and established systems of pleading and procedure heretofore followed by the Federal and State Courts.

The Courts have in the rendition and affirmance of the decree herein, departed from express statutory provisions and also from the accepted and usual course of judicial proceedings, and we urge that there is here a call for the exercise of supervision of this proceeding by the Supreme Court of the United States.

STATEMENT OF THE CASE.

This is a suit for an injunction inhibiting the defendant from the use of water flowing on defendant's mine in Nuggett Creek, Alaska.

The complaint alleges:

That Nuggett Creek is a natural water course flowing all its length through placer claims, and that the plaintiff is the owner of "Discovery" claim, and all mines below it on that creek.

That the plaintiff is hydraulic mining by means of water conveyed through a ditch that has its intake far upstream and which ditch extends therefrom along the right bank of Nuggett Creek until opposite "Discovery" claim. (Tr. pp. 3, 4.)

That plaintiff was using the ditch to divert this creek water around and away from down-stream claims for plaintiff's use on "Discovery" claim.

That the defendant owns three placer mines: "One Above", "Two Above", and "Three Above", all up-stream from plaintiff's locations, and uses Nuggett Creek water thereon in mining.

This case was tried upon a complaint which admittedly, as declared by the trial and Court of Appeals, did not state facts to constitute a cause of action, and which the record shows was never amended.

At the conclusion of the hearings the trial Court said:

"The Court is not going to hold the parties to the pleadings in this case. The Court is doubtful if the complaint states a cause of action.

"The Court is going to supplement the pleadings by the evidence and decide the case under the evidence adduced rather than on the formal pleadings made by the parties." (Tr. p. 105.)

This, we urge, was in excess of the power or jurisdiction of the trial Court.

The method of pleading and the pleadings for and in the Territorial Courts of Alaska are prescribed by Act of Congress.

The Circuit Court of Appeals in its majority opinion said:

"We here treat the complaint as amended."

This, we submit, was beyond its power and authority.

One of the Judges of the Court of Appeals dissented from the decision in this case, and wrote in his opinion that the decree was based on a finding "that appellees and their predecessors in interest made an appropriation of the waters of Nuggett Creek prior to the year 1917". *"This finding was based on nothing at all.* Appellees did not allege, prove or attempt to prove that they or their predecessors in interest ever made an appropriation of the waters of Nuggett Creek." "The decree should be reversed." (Italics ours.)

The prevailing opinion states: "The testimony *tends to show* that the Old Company Ditch was the earliest on the stream." (Italics ours.)

What does "tend to show" mean? Certainly not that the *fact* exists. It is required that the fact be fully proven.

The complaint did not allege and the testimony did not show an appropriation or an adverse continuous use for the Alaska statutory seven years or for any period of time. The prevailing opinion states that "Appellant's claims are riparian." They are, because Nuggett Creek flows through them, but appellant's rights to use water were not asserted or claimed in that kind of a title but because of actual use in placer mining. The mines had been located in 1906. (Tr. pp. 81, 54, 81.) Appellant claimed the right to use the creek water running through his claims in the sluice boxes into which he shoveled the gravel.

> "Placer claims cannot be worked without water."
>
> *Snyder v. Colorado Co.,* 181 Fed. 67.

The mines were there before any ditch. Otherwise there was no need of ditches.

There is an absence of proof of an appropriation of the water and also of an adverse continuous use for seven years. Neither was pleaded or proven.

QUESTIONS PRESENTED.

FIRST. Congress prescribed for the Territorial Courts of Alaska, the forms of pleadings, methods of trial and judgments.

The Court of Appeals herein repeals these Acts of Congress.

Its decision is in direct conflict with those of all other Federal Courts.

SECOND. It violates fundamental principles of pleading, practice and decision heretofore followed.

THIRD. The complaint pleaded no facts constituting a cause of action. It was never amended. The Court had no power to assume that it had been amended. Further, the evidence adduced at the trial did not elicit facts sufficient to state a cause of action.

FOURTH. The decree gave plaintiff 360 inches of water when there is no allegation in the complaint and no evidence that plaintiff had made an appropriation of water.

The ownership of water is dependent upon appropriation and its use.

FIFTH. It is necessary to set forth and prove the facts showing an appropriation or an adverse con-

tinuous user for seven years. It must be proven when the water was to be or was actually diverted and continuously used, the means thereof, and the volume of water actually in use.

CONCLUSION.

For the reasons heretofore set forth, the petitioner respectfully prays that this Court grant its petition for certiorari.

Dated, San Francisco, California,
June 4, 1941.

W. H. METSON,
Attorney for Petitioner.

P. H. MCCARTHY, JR.,
Of Counsel.